



DEQ - WCRO

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# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

L. Preston Bryant, Jr.  
Secretary of Natural Resources

West Central Regional Office  
3019 Peters Creek Road, Roanoke, Virginia 24019  
Telephone (540) 562-6700, Fax (540) 562-6725  
[www.deq.virginia.gov](http://www.deq.virginia.gov)

David K. Paylor  
Director

Steven A. Dietrich  
Regional Director

### STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO BENCH MARK BUILDERS, INC.

#### SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d) by the Board to Bench Mark Builders, Inc., for the purpose of resolving certain violations of environmental law and/or regulations.

#### SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 62.1-44.7 and 10.1-1184.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Order.
6. "Bench Mark" means Bench Mark Builders, Inc., a Virginia corporation.
7. "Corps" means the U. S. Army Corps of Engineers.
8. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia.
9. "Regulation" means the Virginia Water Protection Permit Program Regulation, 9 VAC 25-210-10 *et seq.*

10. "VWP Permit" means a permit issued under the Regulation for wetlands or perennial stream impacts.
11. "The Preserve" means a subdivision owned and being developed by Bench Mark in Roanoke County known as "The Preserve at Two Ford Road".

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. Bench Mark and its consultant, Lumsden Associated, PC ("Lumsden") met at the Preserve with DEQ and Corps staff on April 8 and May 9, 2005 to discuss applicable permit requirements for the planned subdivision, including potential stream impacts.
2. DEQ staff inspected the Preserve on February 28, 2006 and observed that Bench Mark had relocated about 150 linear feet of a perennial unnamed tributary of Mud Lick Creek without having first obtained a VWP Permit.
3. Code § 62.1-44.5.A states that

Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; or 4. On and after October 1, 2001, conduct the following activities in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that caused significant alteration or degradation of existing wetland acreage or functions.

4. Bench Mark has not obtained a VWP permit for stream disturbance at the Preserve.
5. On March 20, 2006, DEQ issued a Notice of Violation to Bench Mark for causing stream impacts at the Preserve without a VWP permit in violation of Code § 62.1-44.5 and 9 VAC 25-210-50.
6. In a letter dated March 27, 2006, Environmental Services & Consulting LLC submitted a Corrective Action Plan on behalf of Bench Mark for the Preserve. DEQ approved the Corrective Action Plan in a letter dated March 30, 2006.

#### **SECTION D: Agreement and Order**

Accordingly, the Board, by virtue of the authority granted it in Va. Code §62.1-44.15(8a) and (8d), orders the Bench Mark, and Bench Mark agrees, to perform the actions described below and in Appendix A of this Order. In addition, the Board orders Bench Mark, and Bench Mark voluntarily agrees, to pay a civil charge of \$5,000.00 within 30 days of the effective date of this



Bench Mark Builders, Inc.

Order in settlement of the violations cited in this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia". Payment shall be sent to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 10150  
Richmond, VA 23240

Payment shall include Bench Mark's Federal Identification Number and shall state that it is being tendered in payment of the civil charges assessed under this Order.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of Bench Mark, for good cause shown by Bench Mark, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (a) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (b) seeking subsequent remediation of the facility as may be authorized by law; or (c) taking subsequent action to enforce this Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Bench Mark admits the jurisdictional allegations contained herein.
4. Bench Mark declares that it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.* and the State Water Control Law, Va. Code § 62.1-44.2 *et seq.* and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and agrees to waive any objection to, or appeal from, the entry of this Order. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or judicial review of, any action taken by the Board to enforce this Order.
5. Failure by Bench Mark to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
6. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

Bench Mark Builders, Inc.

7. Bench Mark shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Bench Mark shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Bench Mark shall notify the WCRO Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth: (a) the reasons for the delay or noncompliance; (b) the projected duration of any such delay or noncompliance; (c) the measures taken and to be taken to prevent or minimize such delay or noncompliance; and (d) the timetable by which such measures will be implemented and the date full compliance will be achieved. Failure to so notify the WCRO Regional Director within twenty-four hours of learning of any condition above, which Bench Mark intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order.
8. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
9. This Order shall become effective upon execution by both the Director or his designee and Bench Mark. Notwithstanding the foregoing, Bench Mark agrees to be bound by any compliance date that precedes the effective date of this Order.
10. Any plans, reports, schedules or specifications attached hereto or submitted by Bench Mark and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
11. This Order shall continue in effect until: a) Bench Mark petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of this Order, b) the Director or Board terminates the Order in his or its sole discretion upon 30 days notice to Bench Mark, whichever occurs earlier. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Bench Mark from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. The undersigned representative of Bench Mark certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Bench Mark to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Bench Mark.
13. By the signature of an authorized official below, Bench Mark voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 12<sup>th</sup> day of SEPT., 2006.

Steven A. Dietrich  
For David K. Paylor, Director  
Department of Environmental Quality

Bench Mark voluntarily agrees to the issuance of this Order.

By: Brent Fortenberry  
Commonwealth of Virginia

City/County of Roanoke

The foregoing document was signed and acknowledged before me this 31<sup>st</sup> day of  
May, 2006, by Brent Fortenberry, who is President of  
Bench Mark.

Rita A. Joyce  
Notary Public

My commission expires: 6/30/2007





**APPENDIX A  
SCHEDULE OF COMPLIANCE**

1. Except in compliance with a VWP permit, Bench Mark shall not dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, excavate in wetlands, or conduct the following activities in a wetland: a) New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b) Filling or dumping; c) Permanent flooding or impounding; d) New activities that cause significant alteration or degradation of existing wetland acreage or functions.
2. Bench Mark shall comply with the approved Corrective Action Plan for the Preserve, as described at Paragraph C.6 herein.